In *Cecil Rajah* v. *Public Prosecutor*[3] where the facts are quite similar in that the applicant was acquitted by the Sessions Court at the end of the prosecution case and on appeal by the respondent the High Court allowed the appeal and ordered the defence to be called. Thereupon, the applicant applied for certain questions of law of public interest to be reserved for the determination of this Court. Concluding the judgment of the Court, Suffian L.P. observed:

"We are of the opinion that in the circumstances of this case the most convenient procedure should be followed, namely that we should uphold the learned judge's order dismissing the application, so that the case should continue before the President of the Sessions Court. Only after he has determined the case, after fully considering counsel's submission on the evidence and the law, and, if there is an appeal, after the learned High Court judge has given us the benefit of his views on all the points raised, will it be convenient for us to consider such points of law of public importance that may be referred to us by him under section 66(1)."

We did not think we should interfere with the decision of the learned Judge. The trial should continue before the learned President. We would dismiss the application.

Application dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar.*

LEE WAI KIN v. YULEK SDN. BHD.

[O.C.J. (Siti Norma Yaakob J.) February 12, 1986]

[Kuala Lumpur – Originating Summons No. F. 1013 of 1985]

Strata Title – Sale and purchase of flat – Purchase price paid by purchaser – Strata title not issued – Charges and expenses to be paid by whom – Strata Titles Act, 1985, ss. 8(1) & 10.

Conveyancing – Sale and purchase of flat – Strata title not issued – Charges and expenses to be paid by whom – Strata Titles Act, 1985, ss. 8(1) & 10.

The plaintiff, by agreement of sale and purchase dated October 4, 1973, purchased a flat in a block of buildings developed by the defendant. He had paid the purchase price of $13,000 and is in occupation of the flat. Strata title to the flat has not been issued to the plaintiff, and the defendant had been demanding various sums of money from the plaintiff for expenses to be incurred for applying for such a title. The plaintiff referred several questions to the Court for determination.

Held: (1) it was incumbent upon the defendant to apply for the strata title on behalf of the plaintiff;

(2) the defendant was entitled to collect payment from the plaintiff for the expenses to be incurred in the application for the strata title;

(3) the amount to be collected from the plaintiff must be the prescribed fee that was to be paid under section 10 of the Strata Titles Act 1985. As the defendant had been guilty of the delay it was only right and proper that it should be prepared to advance its own funds for the costs of the application and then seek a reimbursement from the plaintiff of such costs which amount must be the prescribed fee under section 10 of the Strata Titles Act 1985;

(4) the defendant was not entitled to collect payment of the prescribed fee from the plaintiff in advance;

(5) as the parties had agreed that $50 shall be charged for each assignment, the defendant could not, by reason of inflation, raise the consent fee to $500;

(6) the defendant is not entitled to increase the maintenance fee generally from $2.50 to $15 per month, to collect a sum equivalent to 3 months maintenance fee in advance and to charge interest on overdue payment.

ORIGINATING SUMMONS.

By this summons the plaintiff sought the following relief, *viz.*, the determination of the court on the following questions and issues:

(a) whether the agreement dated October 4, 1973, in particular, clauses 20 and 24 imposed a contractual obligation on the defendant to apply for strata title;

(b) if the answer to paragraph (a) is negative; whether Part Nine Chapter 4 of the National Land Code, 1965 imposes a statutory duty on the defendant to apply for strata title;

(c) if the answer to either paragraph (a) or paragraph (b) or both of them are in the positive; whether the defendant is entitled to collect payment from the plaintiff for the expenses which may be incurred in the application for strata title;

(d) if the answer to paragraph (c) is in the positive; what is the basis or criteria to be used for assessing the amount of payment to be collected from the plaintiff, and in particular, whether the defendant is entitled to make profit out of the application for strata title;

(e) if the answer to paragraph (c) is in the positive; whether the defendant is entitled to collect payment from the plaintiff in advance;

(f) pending application and issuance of the strata title; whether the defendant is entitled to charge the plaintiff a "consent fee" of $500.00 for consenting to any intended assignment;

(g) pending application for strata title and incor-

poration of a Management Corporation;

(i) whether the defendant is entitled to increase the maintenance fee generally from $2.50 per month to $15.00 per month;

(ii) whether the defendant is entitled to collect a sum equivalent to three (3) months' maintenance fee as deposit;

(iii) whether the defendant is entitled to charge interest on overdue maintenance fee.

N. H. Wong for the plaintiff.

I. V. Francis for the defendant.

Cur. Adv. Vult.

Siti Norma Yaakob J. : The defendant in this originating summons is a developer who in the early 1970's had embarked in a large development scheme on several pieces of land which it owned. The scheme involved construction of 6 blocks of 4 storey buildings consisting of 560 units of flats which it sold to the public. The plaintiff bought one of them pursuant to a sale and purchase agreement dated October 4, 1973 and has since paid the purchase price of $13,000/- and is in occupation of the flat.

As the property has not been issued with a strata title, the defendant had, over the years, been demanding various sums of money from the plaintiff for expenses to be incurred for applying for such title. In addition, the defendant had demanded for an increased maintenance fee from the plaintiff as well as an increased sum by way of consent and vetting fee from the other purchasers for the purpose of assigning their properties. Dissatisfied with the indiscriminate manner in which the various sums of money had been demanded, the plaintiff referred several questions which are clearly set out as (a) – (g) in this originating summons for my determination.

Questions (a) and (b)

The defendant concedes to the issues raised in view of the repealed section 151A (1) of the National Land Code 1965 and the law now in force namely section 8(1) of the Strata Titles Act 1985 which makes it compulsory for the proprietor of any alienated land on which there is a building of 2 or more storeys to apply for a sub-division of the building into parcels each to be held under a separate strata title. Thus it is incumbent upon the defendant to apply for the strata title on behalf of the plaintiff.

Question (c)

This relates as to who should bear the burden of meeting the costs of applying for the strata title. The defendant maintains that the plaintiff should do so by virtue of clause 28 of the sale and purchase agreement entered between them. The plaintiff considers it to be otherwise as the meaning of clause 28 is ambiguous and that the agreement should be construed against the maker, *i.e.* the defendant.

The first sentence of clause 28 states that "the costs of and incidental to this Agreement, any subsequent assignment and the final transfer to him shall be borne by the Purchaser." Reading the agreement in its entirety, I do not consider that the words "final transfer" in clause 28 are ambiguous in meaning. They can only refer to the issuance of the strata title as that is the final act that establishes the plaintiff as the registered proprietor of his flat. As its issue is solely for the benefit of the plaintiff, it is only right and just that he should meet the costs of applying for such title. So for question (c), I hold that the defendant is entitled to collect payment from the plaintiff for the expenses to be incurred in the application for the strata title.

Question (d)

The amount to be collected from the plaintiff must be the prescribed fee that is to be paid under section 10 of the Strata Titles Act 1985 and in making the ruling that the plaintiff is to meet such payment, the defendant should not take that as an opportunity to hike up the prescribed fee under the guise of administrative costs so as to make a profit in making such application. This is so as the defendant had delayed considerably in making the application and had insisted as a condition precedent for the application that the plaintiff deposit a specified sum which had been increased over the years as estimated expenses involved in the application. On June 3, 1980, the defendant had demanded that the plaintiff deposit $500/- as being the estimated costs of the application. This amount was raised to $578.55¢ in June 1983 and 2 months later, in August, 1983, the amount was again raised to $700/-

No reason is given why the expenses cannot be

determined or why the defendant had delayed in applying for the strata title. Before the coming into effect of the Strata Titles Act 1985, the relevant provision of the law applicable was section 153 (1) of the National Land Code 1965 which prescribed the procedure for such application on payment of the prescribed fee. The delay must, to some extent, affect the amount of expenses to be incurred and as the defendant has been guilty of it, it is only right and proper that it should be prepared to advance its own funds for the costs of the application and then seek a reimbursement from the plaintiff of such costs which amount must be the prescribed fee under section 10 of the Strata Titles Act 1985.

Question (e)

Based on what I have stated earlier, I consider that the defendant is not entitled to collect payment of the prescribed fee from the plaintiff in advance.

Question (f)

I now come to consider whether the defendant is entitled to charge $500/- as consent fee for any intended assignment. Clause 11 of the agreement allows the defendant to charge only $50/- as the administrative fee for every assignment it had consented to. The $50/- administrative fee is the costs of maintaining a complete record of such assignment or sub-sale by each purchaser of the flats. As the parties had agreed that $50/- shall be charged for each assignment, the defendant cannot, by reason of inflation, raise the consent fee to $500/-.

Question (g)

Lastly, I come to consider whether the defendant is entitled to

(1) increase the maintenance fee generally from $2.50 to $15/- per month,

(2) collect a sum equivalent to 3 months maintenance fee in advance and,

(3) charge interest on overdue payment

The common services which the defendant agreed to maintain are

(1) the roads and drains.

(2) the lights on the main road.

(3) the removal and disposal of refuse.

(4) weeding along the edges of the roads and drains.

For providing the above services, the plaintiff had agreed in clause 11 of the agreement to pay the defendant $4/- a month as maintenance fee so long as such services have not been taken over by any local authorities. As such services have since been taken over by Dewan Bandaraya, clearly clause 11 is inapplicable.

Apart from clause 11, clause 20(c) of the agreement allows the defendant to charge each purchaser not less than $2.50 per month for keeping all passageways, stairs and drains clean, for lighting the corridors and staircases, for white washing the external walls, maintenance of the roof and painting the railings from time to time, provided that at least one month's notice shall be given to the purchaser if at any particular month the maintenance fee exceeds $2.50. By generally raising the maintenance fee from $2.50 to $15/- per month, the defendant has clearly acted well beyond what had been agreed upon in clause 20(c). The only way a maintenance fee can be increased is when the costs of maintenance of a particular month has been increased due to some extra work like, painting, had to be done to the premises in which case, the defendant should give 1 month's notice of his intention to raise the maintenance fee and the increase is only applicable to the particular month when the extra maintenance had to be done. Thus, to arbitrarily raise the maintenance fee to $15/- per month is contrary to what had been agreed and clearly the defendant has no power to do so. For that matter too, neither can it demand a deposit equivalent to 3 months' maintenance fee. As interest is not chargeable under clause 20(c), here again the defendant has no power to charge such interest. So for question (g), I answer all the issues raised in the negative.

As the plaintiff is not asking for costs, I make no order as to costs in this originating summons.

As the same questions and issues have been raised in Originating Summons F.1391/85, I accordingly answer them in the same manner I have done in this originating summons, and likewise, I also make no order as to costs in Originating Summons F. 1391/85.

Order accordingly.

Solicitors: *Lee & Wong; Amir Toh Francis Khoo & Partners.*